U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 16-0567 BLA
and 16-0568 BLA

CHRISTINA E. DUNCAN (o/b/o and Widow of MICHAEL S. DUNCAN)	)	
Claimant-Respondent	)	
v.	)	
MAHON ENTERPRISES, INCORPORATED	)	DATE ISSUED: 07/24/2017
and	)	
WEST VIRGINIA COALWORKERS' PNEUMOCONIOSIS FUND	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Francesca Tan and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2011-BLA-05114, 2012-BLA-06033) of Administrative Law Judge Theresa C. Timlin awarding benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case involves a miner's subsequent claim filed on September 1, 2009,[2] and a survivor's claim filed on April 25, 2012.

After crediting the miner with 15.59 years of underground coal mine employment,[3] the administrative law judge found that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[4] The administrative law judge therefore found that claimant[5] invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis.[6] 30

[1] Employer's appeal in the miner's claim was assigned BRB No. 16-0567 BLA, and its appeal in the survivor's claim was assigned BRB No. 16-0568 BLA. By Order dated October 25, 2016, the Board consolidated these appeals for purposes of decision only.

[2] The miner filed two previous claims, both of which were finally denied. Director's Exhibit 1. The miner's second claim, filed on June 20, 2006, was denied by the district director because claimant failed to establish any element of entitlement. *Id.*

[3] The miner's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Because the new evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that the miner established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

[5] Claimant is the surviving spouse of the miner, who died on April 2, 2012. Director's Exhibit 63.

[6] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis and that his death was due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a

U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

In the survivor's claim, the administrative law judge noted that Section 422(*l*), 30 U.S.C. §932(*l*), provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. The administrative law judge determined that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 932(*l*). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and therefore erred in finding that the miner invoked the Section 411(c)(4) presumption. In addition, employer contends that the administrative law judge erred in finding that employer failed to rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[7]

The Miner's Claim

Invocation of the Section 411(c)(4) Presumption – Total Disability

Employer argues that the administrative law judge erred in finding that the arterial blood gas study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv),[8] and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. The administrative law judge considered three new arterial blood gas studies, conducted on November 16, 2009, November 10, 2010, and

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totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[7] Because employer does not challenge the administrative law judge's finding that the miner had 15.59 years of underground coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] The administrative law judge found that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 17-18. Because this finding is unchallenged on appeal, it is affirmed. *See Skrack*, 6 BLR at 1-711.

December 8, 2010. While only one of the three resting blood gas studies (the November 16, 2009 study) produced qualifying values,[9] two of the three exercise studies (the November 16, 2009 and December 8, 2010 studies) produced qualifying values. Director's Exhibit 12; Employer's Exhibits 1, 4.

In considering the blood gas study evidence, the administrative law judge permissibly accorded greater weight to the exercise blood gas study results, finding that "due to the strenuousness of [the] [m]iner's job, it is logical to ascribe more weight to the results of [the] . . . post exercise arterial blood gas tests." *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 307, 23 BLR 2-261, 2-285-87 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 20. Because two of the three exercise blood gas studies produced qualifying values, the administrative law judge found that the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 19-20. Because this finding is supported by substantial evidence,[10] it is affirmed.

Employer next argues that the administrative law judge erred in her consideration of the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).[11] The administrative law judge considered the new medical opinions of Drs. Rasmussen,

[9] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[10] Employer argues that at one point in her decision, the administrative law judge incorrectly stated that "three of [the miner's] post-exercise blood gas tests qualified." Decision and Order at 20. However, in a chart depicting the blood gas study results, and in a later summary of the blood gas study evidence, the administrative law judge accurately identified the November 10, 2010 exercise study as non-qualifying, and the November 16, 2009 and December 8, 2010 exercise blood gas studies as qualifying. *Id.* at 19-20. Because two of the three exercise blood gas studies produced qualifying values, employer has not explained how the administrative law judge's misstatement undermines her reliance on the exercise blood gas study evidence to find total disability established. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference").

[11] Since there is no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge found that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 21 n.28.

Hippensteel, and Zaldivar. The administrative law judge credited Dr. Rasmussen's opinion that the miner was totally disabled from a respiratory impairment, noting that the doctor "rationally connected the medical evidence of [the] [m]iner's pulmonary condition to the extertional requirements of his . . . usual coal mine employment."[12] Decision and Order at 31; Director's Exhibit 12. Conversely, the administrative law judge found that the opinions of Drs. Hippensteel and Zaldivar on the issue of total disability were "equivocal and unreasoned." *Id*. at 31. The administrative law judge therefore found that the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 32.

Employer argues that the administrative law judge erred in failing to consider all of the relevant evidence of record regarding the disability assessments of Drs. Hippensteel and Zaldivar. In addressing whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge addressed Dr. Hippensteel's 2011 medical report and 2011 deposition testimony, along with Dr. Zaldivar's 2010 medical report and 2011 deposition testimony. Decision and Order at 25-31; Employer's Exhibits 1, 4, 14, 15. Employer accurately notes, however, that the administrative law judge did not address additional deposition testimony provided by Dr. Hippensteel on November 1, 2013, and by Dr. Zaldivar on November 4, 2013. Employer's Brief at 8; Employer's Exhibits 35, 36. Regardless, a review of Dr. Hippensteel's 2013 deposition testimony reveals that the doctor opined that the miner was totally disabled by a moderate pulmonary impairment. Employer's Exhibit 35 at 15. Because Dr. Hippensteel's 2013 deposition testimony supports the administrative law judge's finding of total disability, her failure to address this testimony would not necessitate a remand of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Conversely, a review of Dr. Zaldivar's 2013 deposition testimony reveals that it could, if credited, support a finding that the miner was not totally disabled from a pulmonary standpoint. Although Dr. Zaldivar conceded that whether the miner could

[12] The administrative law judge found that claimant established, through the miner's testimony, that the miner's usual coal mine employment as a continuous miner operator required strenuous activity. Decision and Order at 6, 21; Director's Exhibit 6. The administrative law judge noted that the miner had to load coal, run the motor, run the shuttle, scoop coal, and operate the bolter. *Id.* The administrative law judge further noted that the miner's work required him to carry 100 pounds a distance of 100 feet, four to five times a day. *Id.* Because employer does not challenge the administrative law judge's findings regarding the exertional requirements of the miner's usual coal mine employment, they are affirmed. *Skrack*, 6 BLR at 1-711.

have performed his usual coal mine work depended "on exactly what it is that he did in the mines," Director's Exhibit 36 at 23, the doctor ultimately opined that the miner could have performed "medium level work," as well as "heavy work."[13] *Id.* at 31-32. An administrative law judge is required to consider all relevant evidence in the record. *See* 30 U.S.C. §923(b). Because the administrative law judge failed to consider and weigh this relevant evidence, we must vacate her finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand this case for further consideration.

On remand, in reconsidering whether the new medical opinion evidence establishes that miner suffered from a totally disabling pulmonary impairment, the administrative law judge should take into consideration the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). After reconsidering whether the new medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must weigh all the relevant new evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[14] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). Because we have vacated the administrative law judge's finding of total disability, we also vacate the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

Rebuttal of the Section 411(c)(4) Presumption

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge again finds the Section 411(c)(4) presumption invoked. If claimant invokes the presumption of total

[13] Although Dr. Zaldivar opined that the miner could perform heavy work, he indicated that the miner could not do so "comfortably." Employer's Exhibit 36 at 32.

[14] If claimant fails to establish total disability, an essential element of entitlement, benefits are precluded in the miner's claim. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis,[15] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

We affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's contention that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

In considering whether employer established that the miner did not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Rasmussen, Oesterling, Bush, Hippensteel, and Zaldivar. Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD)/emphysema due to coal mine dust exposure and cigarette smoking. Director's Exhibit 12; Employer's Exhibit 3 at 31-32. Although Drs. Bush and Oesterling diagnosed emphysema, Dr. Bush opined that it was "not related to dust pigment deposition," Employer's Exhibit 12 at 2, and Dr. Oesterling attributed the disease to "tobacco smoke." Employer's Exhibit 31 at 7. Drs. Hippensteel and Zaldivar opined that the miner did not suffer from legal pneumoconiosis. Employer's Exhibits 1, 4. Dr. Hippensteel attributed the miner's pulmonary impairment to "his prior lung surgeries and continued heavy smoking with bronchitis from smoking." Employer's Exhibit 4 at 8. Dr. Zaldivar attributed the miner's restrictive impairment to a loss of lung tissue from prior lung surgeries. Employer's Exhibit 1 at 3. Dr. Zaldivar also diagnosed a mild obstructive impairment due to smoking. Employer's Exhibit 36 at 19-20, 24-25.

[15] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

In addressing the conflicting medical opinion evidence, the administrative law judge found that Dr. Rasmussen's opinion was well-reasoned. Decision and Order at 49. Conversely, the administrative law judge found that the opinions of Drs. Bush, Oesterling, Hippensteel, and Zaldivar were not adequately reasoned. Decision and Order at 45-46, 49-51. The administrative law judge therefore found that employer failed to establish that the miner did not suffer from legal pneumoconiosis. *Id.* at 51.

Employer contends that the administrative law judge erred in her consideration of the "pathology evidence." Employer's Brief at 18-19. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Bush and Oesterling because she found that the physicians failed to adequately explain how they eliminated the miner's 15.59 years of coal mine dust exposure as a cause of his emphysema.[16] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14, 25 BLR 2-115, 2-128 (4th Cir. 2012); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); Decision and Order at 45-46.

Employer also contends that the administrative law judge erred in failing to consider the 2013 deposition testimony provided by Drs. Hippensteel and Zaldivar when considering whether their opinions assist employer in establishing that the miner did not suffer from legal pneumoconiosis. In regard to Dr. Hippensteel's opinion that the miner's chronic bronchitis was not due to his coal mine dust exposure, the administrative law judge accurately noted that the doctor relied, in part, on the fact that the miner's pulmonary impairment did not develop until several years after the miner ceased his coal mine employment. Decision and Order at 51; Employer's Exhibit 14 at 18-19. The administrative law judge permissibly discredited that reasoning as inconsistent with the Department of Labor's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40, 25 BLR 2-675, 685-87 (6th Cir. 2014); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 209-10, 22 BLR 2-467, 2-478-79 (3d Cir. 2002); Decision and Order at 51. During his 2013 deposition, Dr. Hippensteel did not specifically address the cause of the miner's chronic bronchitis, or retract his prior basis for eliminating coal mine dust exposure as a cause of the disease. Consequently, the administrative law judge's failure

[16] Although employer generally contends that the administrative law judge erred in her consideration of the "pathology evidence" as it relates to the issue of legal pneumoconiosis, employer does not challenge the basis provided by the administrative law judge for rejecting the opinions of Drs. Bush and Oesterling.

to address Dr. Hippensteel's 2013 deposition testimony was harmless error. *See Larioni*, 6 BLR at 1-1276.

The administrative law judge discredited Dr. Zaldivar's opinion because the doctor did not address whether the miner's coal mine dust exposure contributed to his obstructive pulmonary impairment. Decision and Order at 50. However, as employer accurately notes, Dr. Zaldivar discussed the cause of the miner's obstructive impairment during his 2013 deposition. Dr. Zaldivar explained that because the miner's obstructive impairment was variable, it was not attributable to coal mine dust exposure. Employer's Exhibit 36 at 19-20. Additionally, because the miner's "inflammatory disease was manifested as [a] bronchospasm," Dr. Zaldivar opined that the miner's lung disease was due to smoking. *Id.* at 24-25. Because the administrative law judge failed to consider this relevant evidence, we must vacate her finding that employer failed to establish that the miner did not suffer from legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Finally, employer contends that the administrative law judge erred in her consideration of Dr. Rasmussen's opinion. Although Dr. Rasmussen's opinion does not assist employer in establishing that the miner did not suffer from legal pneumoconiosis, we will briefly address employer's contentions of error in the event that the administrative law judge, on remand, credits Dr. Rasmussen's diagnosis of legal pneumoconiosis over the contrary medical opinion evidence.

Employer contends that the administrative law judge erred in finding that Dr. Rasmussen's opinion was well-reasoned.[17] Employer's Brief at 11-12. We disagree. The administrative law judge found that Dr. Rasmussen's opinion was well-reasoned because he discussed four separate possible etiologies for the miner's pulmonary impairment. Decision and Order at 49. The administrative law judge found that Dr. Rasmussen's opinion was "particularly convincing, because he considered a number of possible etiologies to account for [the] [m]iner's obstructive and restrictive impairments based on the medical evidence of record; and explained the reasoning behind his conclusion that [the] [m]iner's obstructive impairment was due to his coal mine dust

[17] Employer also contends that Dr. Rasmussen's opinion was not well-documented because the doctor did not review any of the biopsy or autopsy records. Employer's Brief at 11. Dr. Rasmussen, however, relied upon the miner's work history, symptomatology, findings on physical examination, and objective test results in rendering his opinion. Director's Exhibit 12. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that Dr. Rasmussen's opinion was sufficiently documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 49.

exposure." *Id.* Because it is based on substantial evidence, we affirm the administrative law judge's finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis was well-reasoned.[18] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

Employer also challenges the administrative law judge's finding that employer failed to establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii). Because we have vacated the administrative law judge's finding that employer failed to establish that the miner did not suffer from legal pneumoconiosis, we also vacate the administrative law judge's determination that employer failed to establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii).

Employer argues that the administrative law judge erred in her consideration of whether Dr. Oesterling's opinion established that no part of the miner's respiratory or pulmonary total disability was caused by clinical pneumoconiosis.[19] We disagree. The administrative law judge noted that Dr. Oesterling opined that the miner's clinical pneumoconiosis was the "lowest level of the disease [which] does not typically result in any alteration in pulmonary function." Decision and Order at 42, 65; Employer's Exhibit 32 at 12. The administrative law judge permissibly found that Dr. Oesterling's opinion

[18] Employer asserts that the reliability of Dr. Rasmussen's opinion is undermined by the doctor's reliance upon "a seriously under-reported smoking history." Employer's Brief at 12. After determining that the miner had a sixty pack-year smoking history, the administrative law judge noted that Dr. Rasmussen relied upon a smoking history of "at least" thirty-eight pack-years. Decision and Order at 8. The administrative law judge noted that Dr. Rasmussen testified that the miner had a "quite significant" smoking history and was smoking at the time of his evaluation. *Id.* at 24; Employer's Exhibit 3 at 16-17, 23. The administrative law judge also noted that Dr. Rasmussen recorded that the miner's carboxyhemoglobin levels were consistent with a pack-per-day smoker. *Id*. Based on the administrative law judge's consideration of these facts, we conclude that the administrative law judge permissibly determined that Dr. Rasmussen had an adequate understanding of the miner's smoking history. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993).

[19] Because employer does not challenge the administrative law judge's finding that Dr. Bush's opinion was not adequately reasoned with respect to whether clinical pneumoconiosis played any part in causing the miner's pulmonary disability, this finding is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 64.

was not adequately reasoned, because he did not explain why the miner could not have belonged to the subset of miners who develop an alteration in pulmonary function from the amount of pneumoconiosis that he observed.[20] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 42, 65.

However, we note that Drs. Hippensteel and Zaldivar reviewed additional autopsy and pathology evidence before providing their 2013 deposition testimony. After reviewing this evidence, Drs. Hippensteel and Zaldivar opined that the miner suffered from clinical pneumoconiosis, but that it did not contribute to his disability. Employer's Exhibit 35 at 9-10; Employer's Exhibit 36 at 21, 24. Because the administrative law judge did not consider this testimony in addressing the second method of rebuttal, i.e., whether employer can establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201," we must also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.305(d)(1)(ii), and remand for further consideration.

In summary, if the administrative law judge finds, on remand, that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption and cannot establish entitlement under 20 C.F.R. Part 718. However, if the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant will have invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. In that case, the administrative law judge must reconsider whether employer has established rebuttal of the presumption, as discussed *supra*.

The Survivor's Claim

In light of our decision to vacate the administrative law judge's award of benefits in the miner's claim, we also vacate the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(*l*). 30 U.S.C. §932)(*l*). On remand, should the administrative law judge deny benefits in the

[20] Because the administrative law judge provided a valid reason for according less weight to Dr. Oesterling's opinion on the issue of disability causation, we need not address employer's remaining arguments regarding the weight she accorded Dr. Oesterling's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

miner's claim,[21] she must consider whether claimant can establish entitlement to survivor's benefits pursuant to Section 411(c)(4),[22] or by establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988).

[21] If the administrative law judge, on remand, again awards benefits in the miner's claim, claimant is automatically entitled to benefits in the survivor's claim pursuant to Section 932(*l*). *See* 30 U.S.C. §932(*l*).

[22] On remand, if the administrative law judge finds that the evidence establishes that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), claimant would invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. In that case, the administrative law judge would be required to address whether employer could rebut the presumption by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii).

Accordingly, the administrative law judge's the Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge